No. 11828

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE STAR, a corporation and E. L. SKEEL, Liquidating Trustee, *Appellants*,

vs.

JOHN RANDOLPH and PHILIP W. TAYLOR, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF

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REPLY BRIEF

I.

THE FINAL JUDGMENT OF THE DISTRICT COURT IS REVIEWABLE IN THIS COURT

In their answering brief (B 25-26) appellees have argued that the judgment of the trial court is not appealable and hence is not properly reviewable by this court. The Selective Training and Service Act of 1940 requires that a speedy hearing be given to cases arising under its provisions. That requirement of speed does not thereby make the judgment upon that hearing a non-appealable order. Such a contention is indeed novel in light of the many decisions

under the Selective Training and Service Act of 1940, which have not only gone to the Circuit Courts of Appeal for review:

Feore v. North Shore Bus Company (1947) 161 F.(2d) 552;

Fishgold v. Sullivan Drydock and Repair Corporation (1946) 154 F.(2d) 785;

Gauweiler v. Elastic Stop Nut Corporation of America (1947) 162 F.(2d) 448;

Trailmobile Company v. Whirls (1946) 154 F.(2d) 866.

but to the United States Supreme Court as well:

Fishgold v. Sullivan Drydock and Repair Corporation (1946) 328 U.S. 275, 90 L. ed. 1230;

Trailmobile Company v. Whirls (1947) 331 U.S. 40, 91 L. ed. 939.

As stated in our opening brief (B. 2) appellant's reply upon specific statutory authority for this appeal. The judgment in the trial court was beyond doubt a "final decision" of a District Court, and by 28 U.S.C.A., Sec. 225, the Circuit Courts of Appeal have express jurisdiction to review such decisions.

II.

THE CONTRACT BETWEEN THE SEATTLE STAR AND THE NEWSPAPER GUILD DEFINES THE "ESTABLISHED RULES AND PRACTICES" CONTEMPLATED BY THE SELECTIVE TRAINING AND SERVICE ACT AND MUST NECESSARILY BE REFERRED TO IN DETERMINING THE RIGHTS ACCORDED A RETURNING VETERAN BY THE ACT

It is evident from statements made in their brief that appellees have misapprehended the basis of appellants' appeal.

In the first place, appellants do not rely upon the provisions of Article X of the contract between The Star and the Guild (R. 23) in force at the time appellees were inducted. Article X of the contract at the time appellees were inducted specifically provided that time spent on leave of absence was not to be counted in the computation of severance pay of veterans. Twice in their answering brief (B. 14 and 18) appellees indicate it is their belief that appellants place strong reliance upon Article X. An examination of appellants' opening brief will reveal that Article X was not only not relied upon, it was not so much as mentioned.

Attention is invited to incorrect statements of fact concerning Article X made by appellees. Twice in their brief (B. 14 and 18) appellees state that *prior* to the induction of appellees, Article X had been modified to eliminate the provision that time on leave of absence should not be counted in computing severance pay. That is incorrect. The stipulated facts were exactly the reverse (R. 18) they recite:

> "No. 9. That Article X of the contracts between the Seattle Star and the Seattle Newspaper Guild in force from October 5, 1940 to January 2, 1944, was identical in form with Article X as it appears in Exhibit 'B' attached hereto. * * *"

Appellants do *not* rely upon Article X of the contract. Appellants rely on the provisions of Article VIII of the contract.

Appellees contend in their answering brief (B. 13) that Article VIII "undertook to modify the plain provisions of the statute" and that Article VIII is therefore void. This position, we submit, is demonstrably untenable.

The Selective Training and Service Act (Title 50, U.S.C.A., App., Sec. 308) assures the re-employed veteran of four specific things which we illustrate by subdividing the section as follows:

> "(c) Any person who is restored to a position * * *, (1) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, (2) shall be so restored without loss of seniority, (3) shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and (4) shall not be discharged from such position without cause within one year after such restoration."

These words which we have designated as subdivision 3 of Section 308(c) above make it clear that Congress intended that returning veterans should get only those "other benefits" which non-veterans on leave of absence from the same employer would get. Congress established no absolute rights to "benefits." Whatever "benefits" veterans should get were all relative — relative to the "benefits" which non-veterans on leave of absence were entitled to receive. Therefore, in order to determine what "benefits" returning veterans were entitled to receive, we must first determine what "benefits" a non-veteran returning from leave of absence was entitled to receive. The plain words of the statute, as quoted above, certainly permit of only one mode of determining such rights or benefits, namely, the rules and practices relating to employees on furlough or leave of absence *in effect with the employer at the time such person was inducted.*

The provisions of Article VIII which established the "rules and practices relating to employees on furlough or leave of absence," were precisely the type of contractual provisions contemplated by Congress. The contract established the very "rule * * * relating to employees on furlough or leave of absence" contemplated as a prerequisite to the application of the Act. We submit that Article VIII did not, as claimed by appellees, "modify the plain provisions of the statute." It provided the required element, that is the "established rule" or "practice" necessary for the proper application of the Act.

Appellees argue in their answering brief (B. 13, 15, 22) that the provisions of Article VIII relating to leaves of absence can have no application to the claims of appellees because their leaves of absence resulted from involuntary absence due to being inducted into the Armed Service. It is contended that the provisions of Article VIII in this respect apply only in cases where a leave of absence is voluntary and the subject of a written agreement between the employer and the employee. We submit that subdivision 5 of Article VIII applies to all persons on leave of absence. By the terms of subsection 5, as it is written, an employer could refuse to agree in writing that an employee would be granted leave of absence without prejudice to continuing service in the determination of severance pay. With respect to a man inducted into the Armed Services, and even one who volunteered his services, Congress specifically directed that when that person was restored to a position in accordance with the provisions of the Selective Training and Service Act, he "shall be considered as having been on furlough or leave of absence during his period of active military service * * *." Congress saw fit to protect the veteran against the possibility of an employer being able to discriminate against him by refusing to give him a "written agreement" as contemplated by the contract. Congress, by the Act, actually extended the application of the paragraph in the contract to include involuntary leaves of absence resulting from induction into the Armed Services. It said in effect: any absence from employment for the pur-

pose of military service, whether voluntary or involuntary, establishes the status of leave of absence, written agreement or no written agreement.

The statute establishes the standard for determining what time counts in computing severance pay. It says that the right to the benefit of severance pay shall be in accordance with established rules and practices relating to employees on furlough or leave of absence in effect with the employer at such time as such person was inducted into such service.

As regards insurance and "other benefits," Congress provided that a returning veteran was to be treated in precisely the same manner as a non-veteran returning from a voluntary leave of absence. In compliance with that Congressional mandate the Seattle Star treated appellees as regards severance pay exactly as directed. We submit that the trial court was therefore in error in holding that the appellees should have received the same severance pay which they would have received had they been continuously in the employ of the Seattle Star.

Appellees place great reliance upon *Fishgold v. Sullivan Drydock & Repair Corporation* (1946) 328 U.S. 275, 90 L. ed. 1230, and quote the following language from the opinion in that case (B. 17, 21, and 24):

> "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence."

The Supreme Court had before it in the *Fishgold*

case the question of *seniority* not *benefits* (Title 50 U.S.C.A. App. 308), provides:

> "(c) Any person who is restored to a position * * * shall be restored without loss of seniority * * *."

The case at bar, involves the rights of returning veterans to benefit, other than seniority, and must be decided, not under the provisions relating to seniority, but under the provisions relating to "other benefits," as follows (Title 50 U.S.C.A., App. 308):

> "(c) Any person who is restored to a position * * * shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *."

It is to be noted that as regards seniority Congress made no reference whatsoever to the "established rules and practices relating to employees on furlough or leave of absence" whereas the very heart of the provision relating to insurance and other benefits is that they are to be determined pursuant to those established rules and practices, in effect at the time of induction.

When, therefore, the Supreme Court spoke in the *Fishgold* case as follows (90 L. ed. 1240):

> "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence."

it was speaking solely in reference to *seniority*, and

that language cannot now be taken from its context and construed to mean that *for all purposes* service in the armed forces is counted as service in the plant.

In the same vein appellees state (B. 16):

> "In other words, appellants recognize for the purpose of seniority and wages, a full time continuous service, but nevertheless refuse to recognize appellees four years' military service as full time continuous service in computing severance pay."

The implication is that, by counting service time in computing seniority, appellants are estopped to deny that service time should be counted in the computation of severance pay. The practice adopted by appellants, however, was in recognition of the obvious distinction between the effect of service time as regards seniority and its effect as regards "other benefits."

Appellees challenge (B. 23) the relevance of *Gauweiler v. Elastic Stop Nut Corporation of America* (1947) 162 F.(2d) 448, which was cited in our opening brief (B. 17). That challenge rests upon the assumption that Article VIII of the Star-Guild contract, was a provision discriminatory against veterans. As we have said, if that particular provision by its own terms applied only to employees of the Star who were not called into the services, it became applicable to the veteran employees also by virtue of the Selective Training and Service Act. Certainly under such circumstances it must be recognized that that clause was non-discriminatory, and, as such, was valid under the *Gauweiler* decision.

Appellees rely upon the case of *Mentzel v. Diamond d/b/a Elizabeth Iron Works Company* (C.C.A.-3, 1948)—F.(2d)—, 14 Labor Cases, Paragraph 64395. It was held in that case that the claimant was entitled to include his military service time as service with the employer in computing the vacation to which he was entitled. In that case, however, as expressly stated in the Findings of Fact of the lower court (—F. Supp.—, 13 Labor Cases Paragraph 63962):

> "i. No evidence was presented of any rules or practices by the respondent governing the computation of the period of 'service' of employees."

There was no clearly "established rule or practice" in the *Mentzel* case as regards inclusion or exclusion of time on leave of absence in the computation of vacation time. The union contract in that case provided:

> "Employees shall receive vacations of one week with pay after one year's service; vacations of two weeks with pay after five years of service."

The Circuit Court in the *Mentzel* case decided merely that in the *absence of an established rule or practice relating to employees on leave of absence,* service time may be included in the computation of vacation time. The issue presented in the case at bar is the converse of the *Mentzel* issue. To sustain the decision of the trial court here, this court must decide that a veteran may include service time in the computation of severance pay *despite a clearly established rule and practice that an employee on leave of absence could not so count such time in the computation of his severance pay.*

We submit that the judgment in favor of the plaintiffs below was in direct conflict with the will of Congress as expressed in the Selective Training and Service Act of 1940.

III.

THE THIRD POINT IN APPELLANTS' OPENING BRIEF IS PROPERLY BEFORE THIS COURT DESPITE THE FACT THAT THAT PARTICULAR POINT WAS NOT INCLUDED IN THE APPELLANTS' ORIGINAL STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL FILED IN THE DISTRICT COURT

The Federal Rules of Civil Procedure (Rule 75 (a)) require that the appellant serve upon the appellee and file with the District Court a designation of the portions of the record to be contained in the record on appeal.

Those rules further provide (Rule 75(d)) that if the complete record is not designated for inclusion in the record on appeal, the appellant must serve with his designation a concise statement of the points upon which he intends to rely on appeal. Appellants complied with those provisions.

Those provisions are, of course, to enable the appellee to designate those additional portions of the record which he feels would be necessary to him in meeting the points upon which the appellant has indicated his intention to rely. It would be obviously unfair to permit appellant to change the points upon which he intends to rely if the appellee in reliance on the statement of points furnished was thereby de-

prived of the opportunity to designate additional portions of the record material on appeal, but that is not the case here.

The rules of the United States Circuit Court of Appeals for the Ninth Circuit expressly provide, as follows:

> "19. PRINTING RECORD. 6. The appellant shall, upon the filing of the record in this court, in all cases, including those on petition to review, to enforce or to set aside an order of a United States Board or Commission, *file with the clerk a concise statement of the points on which he intends to rely on the appeal,* and designate the part of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement and designation. The adverse party, within ten days thereafter, may designate in writing, file with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the part designated." (Italics ours)

In complying with this requirement of this court, appellants adopted the same designated portions of the record deemed necesary by them in their designations filed with the District Court but added one additional point to be relied upon on appeal to those specified in the District Court. Thereafter, appellees had ten days within which to designate additional portions of the record for consideration by this court, but they filed no further designation. As a matter of fact, it is clear that everything necessary for a complete and full determination of the third point

in appellants' brief is in the record on this appeal. That point involves the sole issue of the time of expiration of a returning veteran's right to benefits. The record reveals that both appellees had been reemployed for more than one year after their separation from the armed services. That fact is in and of itself sufficient to enable this court to consider appellants' additional point on appeal.

If appellees could show this court any prejudice to them because of the designation by appellants of this additional point—other than the intrinsic merit of the point itself—we should be happy to consent to its withdrawal from consideration. We submit that no such prejudice can be shown because (1) appellees were afforded an opportunity to designate additional portions of the record after appellants designated their additional point to be relied upon on appeal, and (2) the record before this court contains everything required for the full consideration of the point in question.

CONCLUSION

We respectfully submit that the trial court was in error in its application of the law to the facts, as stipulated, and that in consequence the judgment of the trial court should be reversed.

Respectfully submitted,

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